United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

B P/S

74-1062 74-1816

ORIGINAL

United States Court of Appeals

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UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation,

Plaintiffs-Appellees,

against

FRANKLIN NATIONAL BANK,

Defendant-Appellant.

Appeal from Memorandum Decision and Order and Judgment of the United States District Court for the Eastern District of New York

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BRIEF FOR DEFENDANT-APPELLANT, FRANKLIN NATIONAL BANK

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Preliminary Statement

This is an appeal by defendant-appellant, Franklin National Bank ("Franklin"), from a memorandum decision and order (A. 533-54)*, and the judgment entered pursuant thereto (A. 557-58), of the Honorable Leonard P.

*References to the Joint Appendix are cited throughout as "(A.——)".

Moore, Senior U.S. Circuit Judge (sitting by designation), entered in the United States District Court for the Eastern District of New York on November 28, 1973, which, as modified by a subsequent memorandum decision and order, dated May 9, 1974 (A. 599-603), granted summary judgment to plaintiffs of "such amount as shall satisfy the judgment of the United States against Roosevelt Capital Corporation with interest and costs, said judgment having been entered on August 3, 1966, in an action, *United States* v. *Roosevelt Capital Corp.*, 65 Civ. 162 (S.D.N.Y.) in favor of the United States in the sum of $157,229.17 plus interest from February 8, 1964" (A. 602).

Plaintiff United States of America is a judgment creditor of Roosevelt Capital Corporation ("Roosevelt"), formerly a depositor at Franklin. On August 3, 1966, plaintiff United States obtained a judgment against Roosevelt in an action it brought against Roosevelt in the Southern District of New York (A. 177-78). Plaintiff Mortimer Todel is the Receiver of the funds, assets and property of Roosevelt, having been appointed in the foregoing Southern District case by the Court at the petition of the United States. In this action, instituted on May 11, 1967, plaintiffs seek to recover from Franklin the sum of $160,000 plus interest, said sum constituting a portion of the amount of Roosevelt funds that were on deposit with Franklin and which were disbursed on May 14, 1964 in connection with a transaction involving the sale and purchase of all the outstanding capital stock of Roosevelt. Plaintiffs contend, and the court below found, that such disbursement of funds by Franklin was not authorized by Roosevelt. We will demonstrate below, however, that the disbursement was fully

authorized, having been made in accordance with the express written instructions of Roosevelt and with the knowledge and acquiescence of *all* of the corporation's shareholders. We will further show that even if—contrary to the fact—the initial disbursement was unauthorized, it was fully ratified by *all* of the shareholders of Roosevelt, thereby transforming it into a valid legal corporate act on the part of Roosevelt.

While there are disputed factual issues in this matter which, as we shall point out, require reversal of the summary judgment entered below, there are, in addition, undisputed and indisputable facts which also compel reversal. Thus, for example, the plaintiffs have never controverted the fact that Franklin had no knowledge of the capital structure of Roosevelt, the extent of its assets or liabilities, or for that matter, even of the existence of creditors. The record demonstrates clearly, we submit, that if anyone was entitled to summary judgment, it was Franklin, not plaintiffs.

Statement of the Issues Presented for Review

The issues presented for review on this appeal are:

1. Whether the lower court erred in holding, as a matter of law, that the disbursement by Franklin on May 14, 1964 of the $160,000 out of Roosevelt's account was an unauthorized transaction.

2. Whether, even if initially unauthorized, the disbursement of the $160,000 out of Roosevelt's account was thereafter ratified by the shareholders of Roosevelt.

Statement of the Case

Early in 1962 Roosevelt opened a corporate checking account at Franklin's Roosevelt Field branch in Garden City, New York (A. 516). Aside from the usual activity, in the checking account, Franklin also arranged, at Roosevelt's request for the purchase by Roosevelt of short-term United States Treasury bills which were, as is usual and as a matter of convenience to the depositor, left in custody of Franklin for the account of its depositor. Significantly, at no time did Franklin ever lend money to Roosevelt; nor did Franklin have any information concerning Roosevelt's assets and liabilities other than the funds in the checking account or the purchase by the depositor of U.S. Treasury bills (A. 516).

In May, 1964, Franklin was preparing to open a new branch in New York City at Hanover Square (A. 516). The official opening of the branch was scheduled for May 18, 1964 and a reception in connection with the opening was held at the branch on the evening of May 13, 1964 (A. 516-17). In the course of this reception, one Lonnie Olanow was introduced to Patrick J. Mastronardo, who was then associated with Franklin as an Assistant Cashier assigned to the new Hanover Square branch (A. 517). Mr. Olanow informed Mr. Mastronardo that he was about to purchase Roosevelt—a corporation of which Mastronardo had never heard—and that the closing was scheduled for the next morning, May 14, 1964 (A. 517). Olanow asked Mastronardo whether Franklin could accommodate him and the other participants in the transaction by allowing them the use of one of the conference rooms at the Hanover Square

branch for the closing (A. 517). Mastronardo acceded to the request (A. 517).

The following morning, May 14, 1964, Mr. Olanow came to the Hanover Square branch with a man he introduced as his associate in the purchase, Mr. Ray Pierson (A. 517). In addition, Samuel Stone, the attorney for the purchasers, and Sidney Tolmage, sellers' counsel *and* representative, also arrived at the branch for the closing (A. 517). Thus, in essence, all of the present and prospective shareholders of Roosevelt participated in, or were represented at, the closing. All of these individuals were ushered into a third floor conference room and Mr. Mastronardo returned to his work at his desk on the platform (A. 517).

Prior to the closing neither Olanow, Pierson, Stone, Tolmage, or any other representative of either the purchasing or selling group, had approached Franklin to arrange for the financing of the proposed purchase of Roosevelt (A. 517-18); the only connection between Franklin and the closing transaction at that point in time being the *gratis* use of Franklin's conference room for the closing (A. 518).

After the closing had been proceeding for some time, either Pierson or Olanow came down from the third floor conference room and approached Mastronardo, who was at his desk on the first floor platform, and told him that the purchasers needed certified checks for the closing but since they were from out of town, they could not get checks certified at that time (A. 518). Mastronardo was also informed that Roosevelt had available to it, in Franklin's custody, $187,000 in cash representing the proceeds of matured U.S. Treasury bills (A. 518). Based upon these statements, he

was asked whether Franklin would be willing to accommodate the purchasing and selling groups in consummating the transaction by issuing two bank checks totalling $160,000 *against the funds in Roosevelt's account at Franklin* (A. 518).*

Mr. Mastronardo thereupon checked with the Roosevelt Field branch and verified that sufficient funds were in Roosevelt's account to cover the $160,000 withdrawal (A. 518). He then asked for and received a copy of a letter from Tolmage (representing the sellers) to Stone (representing the purchasers) confirming that the sellers had instructed the Roosevelt Field branch to release the $187,000 to the credit of Roosevelt (A. 518-19). This letter reads as follows (A. 506):

"May 14, 1964.

"Samuel Stone, Esq.
150 Broadway
New York, N.Y.

"Re: Sale of Stock of Roosevelt Capital Corporation

"Dear Sir:

"I am confirming to you that I have today instructed Mr. William Wallace, Jr., Vice President of the Franklin National Bank at Garden City, N.Y. to release to the Roosevelt Capital Corporation $187,000, the pro-

* The lower court erroneously stated that Mastronardo knew that the purchasers *did not* have the funds necessary to consummate the sale (A. 536). The fact is, however, that implicit in what the purchasers told Mastronardo about the need for check certification was the representation that the purchasers *did* have the necessary funds but that since the funds were in an out-of-town bank, they could not get the checks certified in time. Furthermore, Mr. Mastronardo has also sworn—in another portion of his affidavit not cited by the court—that he was under the impression at the time that the purchasers would deposit an equivalent amount of funds in Roosevelt's account (A. 522).

ceeds of Treasury bills which were on deposit with the Garden City Branch of Franklin National Bank to the credit of the Roosevelt Capital Corporation.

"Very truly yours,

/s/ Sidney Tolmage

SIDNEY TOLMAGE
TOLMAGE & HARRIS
20 Vesey Street
New York 7, N.Y."

Franklin then obtained the necessary authorization and instructions from Roosevelt to issue the two bank checks requested, one for $42,000 and the other for $118,000, both payable to the order of Sidney Tolmage, and to charge the Roosevelt account therefor (A. 519). Specifically, Roosevelt opened a new account at the Hanover Square branch; corporate resolutions and signature cards authorizing its officers, including Pierson and Stone, to issue instructions with respect to Roosevelt funds were executed and delivered; and a specific letter of instruction from Roosevelt to Franklin was delivered directing the latter to issue the two official checks (A. 511, 519). The letter of instructions reads as follows (A. 512):

"May 14, 1964

"Franklin National Bank
130 Pearl Street
New York, New York 10015

"Gentlemen:

"Please issue your official checks to order of Sidney Tolmage in the amounts of $42,000.00 and $118,000.00 for delivery to him.

"Very truly yours,

/s/ Ray Pierson
Roosevelt Capital
Corp."

Thereafter, in accordance with Roosevelt's instructions, Franklin issued the two official checks and delivered them either to Pierson or Olanow in the presence of the other participants in the closing (A. 507-08, 520). Franklin then debited the Roosevelt account in the sum of $160,000, the amount of the two checks it had issued at Roosevelt's request (A. 520).

Significantly, there is no dispute that at the time of this transaction, as well as at all times prior thereto:

(a) Franklin had no knowledge of the extent and nature of the assets of Roosevelt other than the funds in Roosevelt's account;

(b) Franklin had no knowledge of the extent and nature of Roosevelt's liabilities or, indeed, whether it even had any debts;

(c) Franklin had no knowledge of Roosevelt's capital structure; and

(d) Franklin had made no loans or advances of any kind to any of the purchasers of Roosevelt (A. 521).

Indeed, Mastronardo did not even know the exact nature of the transaction pursuant to which Roosevelt instructed Franklin to pay out $160,000 to the order of Tolmage. While Mastronardo had the impression that it was a short-term accommodation and that the purchasers would deposit that amount in Roosevelt's account, he was not clear on this (A. 522). For all he knew—and for all the record discloses even as of this late date—the $160,000 disbursement may have been a loan by Roosevelt to the purchasers. Most significant is the fact that plaintiff's papers do not

contain any facts which would prove that the transaction did not constitute a proper disbursement of corporate funds.

Following the closing, Mastronardo arranged for the customary new account credit check of both Pierson and Olanow (A. 523). Unfavorable reports were received about Olanow and Mastronardo requested Olanow to make other banking arrangements for Roosevelt and the other corporations for which he had arranged the opening of accounts at Franklin (A. 523). On May 26, 1964, the Roosevelt account was closed and Mastronardo arranged for the issuance of a certified check payable to Roosevelt in the sum of $67,000, that being the balance in the account at that time, and delivered it to Pierson (A. 523).*

As is clearly evident from the foregoing, the disbursement by Franklin of $160,000 to the order of Tolmage was made pursuant to the express written instructions of Roosevelt and with the full knowledge and acquiescence of all of its shareholders. Whether the transaction was properly authorized initially or ratified afterwards, the fact remains that it was a corporate act pure and simple.

Plaintiffs have instituted this action claiming that the transaction was "improper and unlawful" and that Franklin is thereby liable to them for the $160,000 plus interest. In granting plaintiffs' motion for summary judgment, the lower court passed on one question only, and that is, whether

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* Although this transaction is *not* involved on this appeal, it should be noted that the check was payable to Roosevelt and not to Pierson as the opinion below erroneously indicates (A. 550). In closing the corporate account, Pierson simply requested that this check *payable to Roosevelt* be certified (A. 523).

Pierson was authorized to issue instructions on behalf of Roosevelt; it did not consider or deal with the question of ratification or estoppel. Thus, on two independent grounds, we submit that the decision below should be reversed. First, the disbursement was expressly authorized by Roosevelt and, secondly and in any event, the transaction was ratified by the corporation.

ARGUMENT

In disbursing funds from Roosevelt's account, Franklin was acting pursuant to express written instructions issued by Roosevelt with full knowledge of all of its stockholders.

A. The disbursement of the $160,000 from the Roosevelt account was fully authorized.

Crucial to the lower court's decision granting plaintiffs summary judgment is its factual determination that Franklin was not authorized to disburse the $160,000 in accordance with the letter of instructions to Franklin of May 14, 1964 and the Roosevelt corporate resolutions which authorized Pierson to pay out Roosevelt funds. The lower court grounded this conclusion upon its finding that Pierson was not a corporate officer at the time the instructions were issued and resolutions filed. In so finding, the lower court refused to apply the concept of a simultaneous transaction, dismissing it out of hand with the statement that the letter and corporate resolutions were delivered to Mastronardo before the sale of the stock in Roosevelt was completed (A. 545-46). But this very statement begs the question. We submit that although the corporate resolutions and instructions were executed prior to the consummation of the pur-

chase and sale of Roosevelt, nevertheless, in fact and in law the instructions and resolutions must be deemed effective *simultaneously* with the sale of the stock. Such transactions are normal, everyday occurrences in the commercial world the validity of which have never been challenged.

A hypothetical illustration should demonstrate beyond peradventure the validity and logic of the simultaneous transaction. Assume that a bank authorized to lend money against collateral is requested to make a mortgage loan to a prospective home purchaser. At the closing, the bank cannot make the loan until it receives a mortgage on the property from the purchaser. On the other hand, the purchaser cannot obtain title to the property in order to give the bank the mortgage until he pays the seller the purchase price, which he cannot do until he obtains the loan. Surely, when the bank advances the money at the closing *before the sale is technically made,* no one would contend that the loan is unauthorized or that the bank even for one moment was an unsecured creditor. And this can only be true if the simultaneous transaction concept is adopted. We submit that all real estate sales in which a mortgage loan is needed to close title—and this is an everyday occurrence—proceed on the concept that all acts, namely, the loan, the purchase and the sale, occur at the same time.

Nor is the concept limited to mortgage loans. Virtually every secured transaction involving a purchase cannot close without using the concept of a simultaneous transaction. So, too, in the case at bar, the execution of the resolutions and instructions, the disbursement of the $160,000 and the purchase and sale of the stock, cannot be viewed as separate and independent acts. Rather, as with the mortgage

loan described above, they all occur simultaneously, thereby imbuing all facets of the transaction, including the instructions and the resolutions, with corporate validity.

Furthermore, and totally independent of the validity of the simultaneous transaction concept, the lower court also overlooked the fact that the disbursement of the $160,000 was approved by *all* of the shareholders of Roosevelt—both selling and purchasing. After all, Tolmage was the representative of the selling stockholders; he represented the sellers in every step of the transaction; it was Tolmage who instructed Franklin on behalf of the sellers to release the proceeds of the Treasury bills to Roosevelt's account; and it was Tolmage who accepted on behalf of the selling shareholders the $160,000 in checks which came out of the corporate funds on deposit. In fact, the heading of his letter in which he advised the purchasers' attorney, Mr. Stone, that he had instructed Franklin to release the funds, reads as follows: "Re: Sale of Stock of Roosevelt Capital Corporation" (A. 506).

In addition, Mastronardo's deposition testimony as a *witness,** upon which plaintiffs place so much reliance, also demonstrates that the selling stockholders approved the transaction:

> "Q. [by Mr. Brachtl]: What [was] your discussion with the members of the buying *and selling groups*?
>
> "A. How we could resolve their problem; that is, to effect the closing that day in a way which would be suitable to all parties.

* At the time Mastronardo's second deposition was taken by plaintiffs, from which the foregoing is an extract, he was no longer with Franklin, having become Vice President-Finance of The GSF Corporation (A. 263).

"Q. What was the resolution or the decision?

"A. The resolution would be *the sellers* would make available to the buyers $187,000 representing the proceeds of the matured Treasury bills which would, in turn, enable me to issue the official checks in question, the $118,000 and the $42,000 checks." (A. 370-71; emphasis supplied).

In short, even if the letter of instructions and corporate resolutions are not given effect, the issuance of the cashier's checks to Tolmage against Roosevelt funds on deposit was, nevertheless, an authorized corporate act, having been agreed to by the prior owners of Roosevelt. At the very least, this would constitute a question of fact.

Unless the $160,000 disbursement is held an authorized act, we would be left with the anomolous result that what Franklin was really doing here was lending the money to Pierson—a conclusion which would be totally inconsistent with all the circumstances surrounding this transaction. First, no one from Franklin had even met Pierson prior to May 14, the day of the closing (A. 521). Second, Pierson did not request a loan (A. 521). Third, Franklin had no knowledge of Pierson's credit rating and he furnished no financial statement (A. 521). Fourth, Pierson signed no note or loan agreement and did not deliver any collateral (A. 521).* Fifth, no terms of payment, maturity or rate of interest were ever discussed (A. 521). Finally, Mastro-

* Near the end of the closing, Mastronardo was requested to hold in safekeeping over the weekend the Roosevelt shares which Tolmage sold to Pierson and Olanow and, *purely as an accommodation,* Mastronardo acceded to this request. He was also advised that some certificates were still outstanding and that when these were produced by the seller (or their cash equivalent) they would be given to him and added to the others (A. 522).

nardo did not have the power to make such a loan, whether secured or unsecured (A. 521-22).

Underscoring the inescapable conclusion that the issuance of the $160,000 in checks constituted a proper disbursement of Roosevelt funds on deposit with Franklin and not a loan by Franklin to Pierson, is the fact that otherwise there was no reason for Tolmage to instruct Franklin to release the $187,000 proceeds of the Treasury bills "to the Roosevelt Capital Corporation"; no reason for Tolmage to confirm this in writing to Stone; no reason for Mastronardo to have been given a copy of this letter; and no reason for Mastronardo to verify that these funds were available to Roosevelt. And, most persuasive of all, there was no reason for the letter requesting the issuance of the checks to be signed by Pierson on behalf of "Roosevelt Capital Corp." In sum, Franklin could not possibly have been lending money to Pierson, with whom it had never dealt, and who never requested a loan, signed a note or loan agreement, or put up security.

B. The disbursement to Tolmage of the $160,000 was ratified.

We have already demonstrated that the issuance of Franklin's two official checks aggregating $160,000 against Roosevelt funds was made pursuant to the express written authorization of Roosevelt, by its duly designated signatories. For this reason alone, the lower court decision, which is predicated solely on the finding that there was no authorization, should be reversed.* But even if the lower

* To be sure, plaintiffs cited a host of cases to the lower court dealing with the *unauthorized* withdrawal for personal use of funds from a corporate bank account and the question of the bank's knowledge

(footnote continued on next page)

court was correct in *finding as a fact on this summary judgment motion* that the initial disbursement was not legally authorized by Roosevelt, the decision below should still be reversed. The transaction, even if originally unauthorized, became a fully authorized corporate act upon its ratification by all of the shareholders. It is well settled that an unauthorized act which is thereafter ratified is as legally binding as if it was originally authorized. See, e.g., Restatement of Agency 2d, §§143, 319 (1958).

The doctrine of ratification is especially applicable to acts on behalf of corporations. The New York Court of Appeals succinctly set forth the rationale underlying the doctrine in *Martin* v. *Niagara Falls Paper Manufacturing Co.*, 122 N.Y. 165, 172 (1890) as follows:

> "The general rules of law relating to contracts and property rights apply to corporations as well as to individuals, and the principles of law of agency apply to both alike.
>
> "The stockholders are the equitable owners of the corporate property, and if the officers or trustees do an unauthorized act or incur indebtedness which would not create a corporate liability, the stockholders may subsequently ratify the acts and validate the originally unauthorized transaction. What they might originally have done, they may do afterwards, and their subsequent assent is equivalent to original authority. And many cases would arise when it would be for the inter-

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and responsibility for allowing such withdrawal. *None* of the cases cited, however, foists liability upon the bank when the withdrawal was in fact authorized. Indeed, many of the cases relied upon by plaintiffs below expressly state that the rule is otherwise where the withdrawal is *authorized*. See, *e.g.*, *Bank of Marin* v. *England*, 385 U.S. 99, 101 (1966); *Ward* v. *City Trust Co.*, 192 N.Y. 60 (1908). See, also, *Carson* v. *Federal Reserve Bank*, 254 N.Y. 218, 230 (1930); *Whiting* v. *Hudson Trust Co.*, 234 N.Y. 394, 405 (1923); *Wildenberger* v. *Ridgewood Nat. Bank*, 230 N.Y. 425, 428 (1921).

> est of both corporation and stockholders that an unauthorized act of the trustees should be made valid, or when justice and equity would demand that an unauthorized debt should be paid."

In the case at bar, the disbursement of the $160,000 out of the Roosevelt account was made with the knowledge, and at the insistence, of Pierson and his associate, Olanow, the purchasers of all the capital stock of Roosevelt. Under these circumstances, there can be no question but that the transaction was ratified by Roosevelt's stockholders and that the "unauthorized act of the purchasers became the authorized act of the Corporation." See, e.g., *Field* v. *Lew,* 184 F. Supp. 23 (E.D.N.Y. 1960), *aff'd,* 296 F.2d 109 (2d Cir. 1961).

In *Field,* the trustee in bankruptcy of a corporation challenged three transactions involving corporate funds that were on deposit with Bankers Trust Company. The first transaction concerned four corporate checks payable to Bankers Trust Company which were signed by Martin Lew, the sole stockholder of the corporation. Lew presented these checks to Bankers Trust and in return the latter issued four cashier's checks, each payable to different individuals, two of whom had the same last name as Lew but to whom the corporation owed nothing. In the second transaction, Lew sent a corporate check drawn on Bankers Trust to First National City Bank in part payment of his personal loan. The reverse side of the check bore a notation that it was to be credited to Lew's account at First National City. In the third transaction Lew cashed a corporate check at Bankers Trust payable to himself which closed out the corporation's account and thereafter used the money for his own purposes. In each instance Bankers

Trust honored the checks and debited the corporation's account accordingly.

In rejecting the trustee's claim against Bankers Trust for conversion of the corporation's funds, the District Court, in language applicable to all three transactions, stated as follows:

> "The trustee's first claim involves the four cashier's checks. A corporate officer who uses corporate funds for his own purposes may be liable for conversion to the corporation and in bankruptcy to the trustee. Since the officer had no title to the property, transferees of the officer may be similarly liable. However, the general rule of liability does *not* apply when the officer's acts have been ratified by all the shareholders of the corporation. In that case, *the unauthorized acts of the individual become the authorized acts of the corporation,* the corporation loses its right of action against the officer, and the corporation, having no right, the trustee in bankruptcy also has no right. See Reif v. Equitable Life Assurance Soc'y, 1935, 268 N.Y. 269, 197 N.E. 278, 100 A.L.R. 55; Barr & Creelman Mill & Plumbing Supply Co. v. Zeller, 2 Cir., 1940, 109 F.2d 924; Quintal v. Kellner, 1934, 264 N.Y. 32, 189 N.E. 770; Rosenfeld v. Fairchild Engine & Aviation Corp., 1955, 309 N.Y. 168, 180, 128 N.E.2d 291, 51 A.L.R.2d 860 (dissenting opinion); Capitol Wine & Spirit Corp. v. Pokrass, 1st Dep't 1950, 277 App. Div. 184, 98 N.Y.S. 2d 291; John William Bldg. Corp. v. Union Trust Co., 4th Dep't 1939, 256 App. Div. 885, 9 N.Y.S.2d 14; New York Credit Men's Adjustment Bureau, Inc. v. Manhattan Life Ins. Co., City Ct.N.Y. 1955 149 N.Y.S.2d 778. *Under the facts of the instant case, the corporation would have no action in conversion against Lew, any of his transferees, or any one participating in the transfer, because Lew as sole stockholder ratified his own actions.*" 184 F. Supp. at 27 (emphasis supplied).

Equally pertinent is the District Court's discussion of the trustee's claim under Section 58 of the New York Stock Corporation Law [now B.C.L. §510] which prohibits a corporation from transferring corporate funds which result in an impairment of capital:

> "*As successor to corporate rights of action he has no more right under this section than he has as successor to corporate rights under a conversion theory, and for the same reason: the corporation lost its rights because of the ratification by all of its shareholders to the distribution.* Cf. Capitol Wine & Spirit Corp. v. Pokrass, supra. Secondly, creditors have a claim only for 'loss sustained,' but there was no loss to creditors, or the trustee as subrogee, until the third transaction rendered the corporation insolvent, and on this transaction, Bankers status as holder in due course is a complete defense. See Troll v. Chase Nat'l Bank, 2 Cir., 1958, 257 F.2d 825, 828." 184 F. Supp. at 29 (emphasis supplied).

From the foregoing, it is perfectly clear that any unauthorized acts of Pierson and Olanow—Roosevelt's stockholders—became, as a result of ratification, the authorized acts of the corporation and that, accordingly, plaintiffs cannot hold Franklin liable for debiting Roosevelt's account.*

It may not be amiss to point out that aside from dismissing the conversion claims, the District Court in *Field* rejected the trustee's claims predicated on fraudulent conveyance and impairment of capital. On appeal, the trustee only challenged that portion of the decision that held that

* This situation is analogous to the instance where a promotor, who after forming the corporation becomes its sole stockholder and thereby necessarily adopts on behalf of the corporation a contract he entered into in anticipation of its incorporation. See, *e.g., In re Super Trading Co., Inc.,* 22 F.2d 480 (2d Cir. 1927).

none of the transactions violated the New York statutory prohibition against impairment of capital. This Court, in unanimously affirming the lower court decision, pointed out that only directors or "transferees with knowledge" are liable for impairment of capital and that Bankers Trust was neither a transferee nor did it have sufficient knowledge to put it on notice that the transactions impaired the corporation's capital. *Field* v. *Bankers Trust Company*, 296 F.2d at 111-12.

While in the instant case, the lower court never reached this question, it goes without saying that Franklin is neither a transferee nor, if in fact there was any impairment of capital, did it have any knowledge of such impairment, both indispensable ingredients of liability.

Conclusion

For all the reasons set forth above, the lower court decision granting plaintiffs summary judgment should be reversed.

Respectfully submitted,

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Of Counsel

Service of 3 copies of the within Brief is hereby admitted this 12th day of Aug. 1974

Signed Montgomery Todd (JS)

Attorney for Plaintiff - Appellee

Service of 3 copies of the within Brief is hereby admitted this 12th day of Aug. 1974

Signed Eleanor DeMali

Attorney for Appellee